

CHILDREN AND FAMILIES

DIVISION OF YOUTH AND FAMILY SERVICES

Termination of Parental Rights

Readoption with Amendments: N.J.A.C. 10:133J

Proposed: January 22, 2008 at 40 N.J.R. 587(a).

Adopted: June 16, 2008 by Eileen Crummy, Acting Commissioner, Department of Children and Families.

Filed: June 17, 2008 as R.2008 d. 191 with substantive changes not requiring additional public notice and comment (see N.J.A.C. 1:30-4.3).

Authority: N.J.S.A. 30:4C-1 et seq. and 30:4C-15 through 23.

Effective Dates: June 17, 2008, Readoption;
 July 21, 2008, Amendments

Expiration Date: June 17, 2013

Summary of Public Comments and Agency Responses:

The Division received comments from the Office of the Child Advocate, Legal Services of New Jersey, and the Association for Children of New Jersey. All of the comments related to the proposed amendments to N.J.A.C. 10:133J-2.2(a). The Division wishes to thank the commenters for their interest in these rules.

The preference for adoption rather than kinship legal guardianship as a long-term permanency alternative for a child who cannot be safely reunited with parents is grounded both in law and practice experience. Both the Federal Adoption and Safe Families Act, 42 U.S.C. §620 et seq., and the New Jersey Kinship Legal Guardianship Statute, N.J.S.A. 3B:12A-1b, allow consideration of kinship legal guardianship (KLG) only when adoption is neither likely nor feasible. Adoption clearly provides the highest degree of both physical and emotional security for the child. It allows the adult raising the child (rather than the court) to determine the degree of parental contact that will benefit the child. It also provides a higher level of benefits to the child and family than kinship legal guardianship. Adoption assistance rates can be negotiated to exceed the regular board rate schedule and can be renegotiated if particular issues arise. Rates for kinship legal guardianship cannot.

The Division of Youth and Family Services fully supports placement with relatives or kin when a child enters resource care. The Division's permanency practice is based on a model of Concurrent Permanency Planning, designed to simultaneously and diligently pursue reunification and, at the same time, assure that children are placed with a family that best meets their needs, both temporarily and permanently, if return home cannot be achieved. Commitment to permanency through adoption is a consideration in selecting the most appropriate home for a child who must be placed out of home. For children who cannot be safely reunified, adoption by a relative provides both the continuity of family connections, including, where appropriate, those with biological parents, and the higher level of emotional, physical and financial security provided by adoption. Many adoptions are by relatives and the Division's continuing goal is to increase the number of children who have permanent homes with relatives and kin as is demonstrated by the recent increase in such placements.

It is often difficult for relatives to play a role in determining that a loved one's parental rights should be terminated (TPR), even when there is overwhelming evidence that the parent will not be able to safely care for his or her children. The decision to file a TPR action is fact sensitive and rests with the Division, and is not made by the relative or the court (N.J.S.A. 30:4C-15.3). However, an extremely important consideration in making the decision to file the TPR rests upon whether the relative with whom the child is residing, assuming that this is the best permanent home for the child, will adopt the child if the child becomes legally free.

The rules, as proposed, are well within the legal authority of the Division and are well-supported by case law, policy and practice. There is a well-recognized hierarchy of permanency in New Jersey. That hierarchy demonstrates a preference for adoption over kinship legal guardianship. Moreover, in all instances, the best interests of the child determination applies equally in adoption and KLG situations. The statute provides that KLG is not available unless there is clear and convincing evidence that adoption is neither feasible nor likely.

The best interests of the child determination depends upon many factors and is most appropriately evaluated, in the first instance, by the agency which has the unique responsibility and privilege of presenting permanency plans to the court. Of those many factors to be considered, the well-informed, consensual wishes of the caregiver and the child are taken into account; however, they are not determinative.

Many of the comments received discuss the weight to be given to the preferences of relative caregivers. Following are the Division's responses to the individual comments.

1. COMMENT: The Office of the Child Advocate and Legal Services of New Jersey expressed opposition to amending N.J.A.C. 10:133J-2.2(a) as proposed to make adoption the preferred permanency alternative over kinship legal guardianship. Each raised the following points in support of their position.

In DYFS v. D.H. and J.V., IMO the Guardianship of A.H., 398 N.J.Super. 333 (2008), the appellate decision found that KLG pursuant to the KLG Act is a permanent placement option under certain circumstances.

RESPONSE: The Division does not dispute the viability of kinship legal guardianship as a planned permanency option provided that adoption is neither feasible nor likely. The threshold decision that must precede the decision to pursue KLG as an option is whether or not it is in the best interests of the child to terminate parental rights pursuant to N.J.S.A. 30:4C-15. The rules as amended recognize that decisions must be made on a case-by-case basis and be based on the individual circumstances of the child and family. The recent appellate decision cited by the commenter reversed the subject permanency order based upon the unique facts and circumstances of the matter before it. The court did not go so far to equate KLG with adoption. Division of Youth and Family Services v. P.P., 180 N.J. 494, 510 (2003), explicitly holds that KLG is “not meant to be a substitute for the permanency of adoption, but rather, to provide as much permanency as possible when adoption is not feasible or likely.”

2. COMMENT: N.J.S.A. 9:6B-4(b). The proposed changes move away from this prescription by placing adoption above placement or maintaining placement with a relative.

RESPONSE: The Child Placement Bill of Rights does entitle children “to the best efforts of the applicable department” and “as appropriate to the individual circumstances,” to be placed with a relative. It also recognizes that placement must be made “as appropriate to the individual circumstances.” The Act also provides that a placement plan should reflect the child’s best interests and be designed to facilitate a permanent placement or return home. The Division’s existing and proposed rules are consistent with these standards.

3. COMMENT : Re: Charlie and Nadine H., et al. v. Jon Corzine, as Governor, and Kevin M. Ryan, as Commissioner, Docket No. 99-3678 (SRC). The Department of Children and Families agreed that children in out-of-home placement should be placed in settings that promote the continuity of critical relationships: together with their siblings; and with capable relatives whenever possible. None of the principles of the Modified Settlement Agreement place adoption above other alternatives, but they do identify relative placement as vital in broader considerations of the best interests of the child.

RESPONSE: The Division’s existing and proposed rules comport with the principles set forth in the Modified Settlement Agreement. Those principles focus on the need to protect children in out-of-home care from harm. The Division remains committed to the goal of placing children with relatives. When children have not been safely reunited with their parents and have remained in placement for 12 months, the Division is required to present an appropriate permanency recommendation to the court. The principles envision several possible permanency outcomes and thus reflect the need

and opportunity to hold the child's interests "paramount." The Modified Settlement Agreement does nothing to change the hierarchy of permanency placement.

4. COMMENT: The Office of the Child Advocate expressed a believe that the kinship legal guardianship statute (N.J.S.A. 3B:12A-1 et seq.) identifies KLG as an appropriate permanency plan and that it should be preferred under certain circumstances.

RESPONSE: The KLG statute explicitly requires that KLG be pursued only after adoption has been clearly and convincingly determined to be neither feasible nor likely. State and Federal statutory mandates require the State to move to termination of parental rights where the standards set forth at N.J.S.A. 30:4C-15.1 have been met. In those instances where adoption is feasible and likely, termination of parental rights will be evaluated as described above. The Division has expressed a preference for permanency via adoption but has not expressed a mandate. The rules clearly allow for other planned permanency alternatives when the facts and circumstances indicate that to be in the best interests of the child.

5. COMMENT : N.J.S.A. 30:4C-50 et seq. The Office of the Child Advocate observed that the Legislature established procedures for both administrative and judicial review of each child's placement in order to ensure that such placement ensures the safety and health and serves the best interest of the child. The proposed permanency preference, prior to comprehensive review, is unnecessary and inappropriate.

RESPONSE: The Child Placement Review Act, N.J.S.A. 30:4C-50 et seq., establishes the administrative and judicial review procedures to examine each child's placement in order to ensure that such placement ensures the safety, health and serves the best interests of the child. N.J.S.A. 30:4C-55 requires the Division to develop a placement plan for each child in out-of-home placement. These placement plans must include a permanency plan. These plans are developed in coordination with the child's parents and caregivers. Such plans must be drafted and submitted to the individual Child Placement Review Boards within 30 days of placement. Permanency hearings ensure the Division is satisfactorily moving a child toward permanent placement. The Act does not require that children's permanency plans be reviewed prior to implementation.

6. COMMENT: The Office of the Child Advocate comments that 42 U.C.S. §675(5)(E) reveals a clear statutory purpose recognizing that relative relationships have relevance in consideration of permanency plans. The emphasis on relative care requires that KLG may sometimes be the preferred route and should be evaluated as an appropriate permanency alternative -- not as one inferior to or less preferred than adoption.

RESPONSE: The Division's existing and proposed rules are consistent with the standards set forth in the cited Federal statute. Part E of that section requires that if a child has been in foster care for 15 of 22 months then the state shall file for termination of parental rights and recruit an adoptive family unless "at the option of the state, the child is being cared for by a relative." N.J.S.A. 30:4C-15 parallels the Federal standard and

New Jersey's overall statutory scheme is consistent with Federal mandates. The Division has the discretion to make the decision to pursue relative placement. Neither a court, a relative, nor any other party can foreclose the Division's permanency plan without a trial on the merits of the guardianship complaint, which is required to be filed.

7. COMMENT: The Office of the Child Advocate comments that if the Division infers a need to repair the KLG or the TPR statutes, then that issue should be faced head on and considered on its own merits.

RESPONSE: The Division believes that the referenced statutory provisions are clear.

8. COMMENT: Legal Services of New Jersey comments that proposed N.J.A.C. 10:133J-2.2(a) should be rejected in its entirety as adopting this amendment would exceed the statutory authority of the Department and Division and would contradict current New Jersey public policy, statutes and their judicial interpretations.

RESPONSE: Pursuant to N.J.S.A. 30:4C-2.5, the Commissioner has the authority to adopt rules and regulations necessary to carry out the Division's charge regarding the care, custody, guardianship, maintenance, and supervision of dependent and neglected children. The Division is well within the authority vested in it by N.J.S.A. 30:4C-1 through 40 to propose the subject rules.

9. COMMENT: Legal Services of New Jersey comments that DYFS v. A.W., 103 N.J. 591, 608 (1986), and N.J.S.A. 30:4C-15.1(a)(3) both state the standards for determining whether termination of parental rights is the best interest of the child. Both require the court to have considered alternatives to termination before a guardianship and termination of parental rights can be granted in the best interest of the child.

RESPONSE: As stated above, the Division does not believe that the standard articulated in N.J.A.C. 10:133J-2.2(a) conflicts with the termination of parental rights standards. Kinship legal guardianship may be, under certain circumstances, the appropriate permanency plan for a child placed with a relative. In fact, the Division has increased its reliance upon KLG, increasing the number of finalized KLG's every year since its inception in 2003 to over 2,500 in 2007. In addition, recognizing the value of KLG providers, in 2004, the Division increased the subsidy payments for KLG providers to reflect resource care board rates. Finally, the Division supports relative placement by creating exceptions to the licensing requirements to facilitate placement with relative caregivers. All of these reflect the Division's actual and real commitment to providing children with the most resources within the context of the most appropriate permanency option.

The existing and proposed rules are consistent with the statutory requirements set forth at N.J.S.A. 30:4C-15.1(a)(3). Before termination can be granted, the Division must demonstrate, by clear and convincing evidence, that the four-prong standard has been met. In every case, the best interests of the child are the primary consideration in

determining whether termination is appropriate and necessary. Alternatives to TPR including reunification or placement with non-offending parents are preferred. Absent special circumstances in which a child's best interests render adoption neither feasible nor likely, the permanency of adoption should not be forsaken.

10. COMMENT: Legal Services of New Jersey (LSNJ) comments that social science research has bolstered the public policy of favoring relative placements for children. Four positive outcomes of living with relative caregivers versus placement in non-relative foster homes are noted.

RESPONSE: As described by LSNJ, the benefits of relative placement for children are described in comparison to placement in non-relative foster homes and therefore do not address the subject of this regulation. However, Division policies and practices are supportive of placing children in the temporary care of relatives when appropriate.

11. COMMENT: Legal Services of New Jersey comments that use of the phrase "...when adoption of the child is neither feasible nor likely," without additional explanation or definition suggest a different application than that envisioned by the legislation when it utilized that phrase in the KLG Act. The Legislature clearly intended that a long-term caregiver who is unwilling or unable to adopt should be permitted KLG of the children, without exploration of stranger adoption.

Legal Services of New Jersey goes on to comment that if DYFS adopts the proposed amendment, that DYFS include a definition of "adoption of the child is neither feasible nor likely." LSNJ suggests adopting the following sentence as a second sentence to the proposed N.J.A.C. 10:133J-2.2(a): "Adoption of a child is neither feasible nor likely when a relative or family friend has provided long-term care for the child, expresses willingness to continue to care for the child, but that caregiver is either unable or unwilling to support termination of the parents' legal rights."

RESPONSE: The regulation as proposed clearly delineates the circumstance to be considered by the Division when there is a termination of parental rights. N.J.A.C. 10:133J-2.3 lists those factors to determine the best interest of the child including, but not limited to, the appropriateness and feasibility of all the various permanency options for the child and the out-of-home placement provider's commitment to the child and commitment and capacity to meet the child's needs currently and in the future. The Division interprets the Legislature's intent to allow for an alternative planned permanency arrangement after a determination has been made that adoption is neither likely nor feasible. Moreover, the Division asserts that its statutory mandates as cited above establish that, it alone, with input from family and relevant experts and professionals, subject to oversight by the courts, has the decision-making authority to pursue KLG versus adoption and not the caregiver. While the Division will always consider all viable and practical placement options, the ultimate decision must rest with it and not with the relative or family friend.

The Division agrees that in some circumstances KLG is the most appropriate permanency option. The Division can accept the commenter's statement as true and continue to maintain its preference for adoption. If a relative caregiver makes an informed and voluntary choice, then Division staff will consider his or her preference. The Division seeks to avoid having relative caregivers be perceived as or actually rendering the decision which causes the birth parents' rights to be terminated.

12. COMMENT: The Association for Children of New Jersey (ACNJ) comments that it agrees with the proposed language at N.J.A.C. 10:133-2.2(a).

RESPONSE: The Division thanks ACNJ for its support.

13. COMMENT: The Association for Children in New Jersey comments that some additional explanation may be helpful but did not offer specific suggestions.

RESPONSE: The Division is unclear as to what clarification the ACNJ is seeking.

14. COMMENT: The Association for Children in New Jersey comments that the Division representative should fully inform the caregiver who is interested and committed to providing a permanent home for the child of:

- What permanency means for a child
- The differences between adoption and kinship legal guardianship in terms of legal permanency and financial assistance
- These options in the context of the particular needs of the child

RESPONSE: The Division agrees that all caregivers and potential caregivers should be fully informed regarding planning for permanency, and has established policy and practice to ensure this.

Summary of Agency-Initiated Changes:

At N.J.A.C. 10:133J-3.2(c), the Division is adding that the Division representative shall obtain necessary domestic partnership affidavits and dissolution decrees related to a surrender of parental rights. New Jersey established domestic partnerships in 2004 at N.J.S.A. 26:8A-1 et seq., with amendments effective February 19, 2007.

Federal Standards Statement

N.J.A.C. 10:133J contains subject matter governed by Federal law, specifically 42 U.S.C. §675(5)(E), which sets forth the requirements, and the exceptions to those requirements, for states to file to terminate parental rights of a child's parents. N.J.A.C. 10:133J helps the Division to meet and not exceed the requirements contained in Federal law.

SUBCHAPTER 1. GENERAL PROVISIONS

10:133J-1.1 Purpose

- (a) The purpose of this chapter is to state:
1. The circumstances under which the Division is required to file or join a petition to terminate parental rights and the exceptions to filing; and
 2. The procedures for a parent to surrender parental rights for the purpose of allowing a child to be adopted.

10:133J-1.2 Scope

The provisions of this chapter shall apply to all Division representatives and clients receiving services from the Division.

10:133J-1.3 Definitions

(a) The definitions in N.J.A.C. 10:133-1.3 are incorporated in this chapter by reference.

(b) The following terms shall have the following meanings within this chapter, unless the context clearly indicates otherwise:

"Child advocate" means a person specializing in the field of child advocacy who demonstrates his or her education and/or experience in that field to the satisfaction of the Division, but is limited to such persons who have had direct involvement in permanency planning for the child. Child advocates include, but are not limited to, Child Placement Review Board members, Court Appointed Special Advocates (CASA), and Law Guardians.

"Expert" means a person, duly credentialed in the state in which he or she practices, specializing in the field of pediatric, neurological or psychiatric medicine; nursing; psychology; social work; substance abuse; or other related fields.

"Surrender" means a voluntary relinquishment of all parental rights by a birth parent, adoptive parent, or other person or agency authorized to exercise these rights by law, court order or otherwise, for purposes of allowing a child to be adopted. "Surrender" includes identified surrenders authorized by N.J.S.A. 9:3-41(d).

SUBCHAPTER 2. REQUIREMENTS FOR AND EXCEPTIONS TO TERMINATION OF PARENTAL RIGHTS

10:133J-2.1 Involuntary termination of parental rights

(a) The Division shall file or join a petition to terminate the parental rights of a child's parents when one or more of the circumstances stated in N.J.S.A. 30:4C-15 is established, but no later than when the child has been in out-of-home placement for 15 of the most recent 22 months, unless the Division has established an exception to the requirement to seek termination of parental rights pursuant to N.J.S.A. 30:4C-15.3.

(b) The Division representative consults with the Deputy Attorney General on situations that may meet the standards stated in N.J.S.A. 30:4C-15 and 15.1.

(c) The Division representative shall advise each parent whose whereabouts are known to the Division and whose parental rights the Division is seeking to

involuntarily terminate, that the parent has the right to a trial and to be represented by legal counsel at any involuntary termination of parental rights court proceeding; and, if the parent is unable to afford an attorney, the right of the parent to ask the court to assign an attorney to represent the parent.

(d) When the Division representative makes a determination to pursue termination of parental rights in accordance with N.J.S.A. 30:4C-15 and 15.1, the Division representative shall consider offering the parent an opportunity to surrender his or her parental rights pursuant to N.J.S.A. 30:4C-23. When a parent is offered an opportunity to surrender parental rights, the Division representative shall advise the parent that if the Division pursues legal action to involuntarily terminate parental rights, the parent has those legal rights stated in (c) above.

10:133J-2.2 Exceptions to termination of parental rights criteria

(a) Whereas adoption is the preferred permanency alternative for a child who cannot safely return to the care of either biological parent, the Division may decide not to file for termination of parental rights when adoption of the child is neither feasible nor likely.

(b) The Division representative is not required to file for termination of parental rights if the case circumstances meet at least one of the following three exceptions set forth in N.J.S.A. 30:4C-15.3:

1. The child is being cared for by a relative and a permanent plan for the child can be achieved without termination of parental rights;
2. The Division representative has documented in the case plan, which shall be available for court review, a compelling reason for determining that filing the petition would not be in the best interests of the child; or
3. The Division representative is required to provide reasonable efforts to reunify the family but the Division representative has not provided to the family of the child, consistent with the time period in the case plan, such services as the Division representative deems necessary for the safe return of the child to his or her home.

(c) The Division representative shall document in the case plan the details of the case circumstances meeting the requirements for an exception in (a) or (b) above. The documentation shall include the reasons why adoption is neither feasible nor likely for this child, and is not the most appropriate case goal for this child when the exception is made pursuant to N.J.S.A. 30:4C-15.3b.

10:133J-2.3 Factors to consider when filing for termination of parental rights

(a) The Division representative considers many factors when deciding to file for termination of parental rights or to document a compelling reason in the best interests of the child not to file for a termination of parental rights. Decisions must be made on a case-by-case basis, based on the individual circumstances of the child and the family. The factors considered may include, but are not limited to:

1. The child's age;
2. The child's level of maturity;
3. The child's developmental level and needs;
4. The child's opinion regarding the permanent plan;

5. The placement history, including the length of time the child has been in placement;
6. The progress that each parent has made toward return of his or her child;
7. The relationship between this child and his or her parents;
8. The child's relationship to siblings, if any;
9. The case goal for each of the child's siblings, if any;
10. Expert opinions in respect to permanency planning for the child;
11. The opinions of child advocates in respect to permanency planning for the child;
12. The appropriateness and feasibility of all the various permanency options for this child;
13. The out-of-home placement provider's commitment to the child and commitment and capacity to meet the child's needs currently and in the future;
14. The relationship between the child and the out-of-home placement provider and the out-of-home placement provider's family;
15. The potential permanent caregiver's ability and willingness to assure safety, permanency, and well-being for the child; and
16. Each parent's role in potential permanency plans for this child.

SUBCHAPTER 3. SURRENDER OF PARENTAL RIGHTS

10:133J-3.1 Division responsibilities

- (a) The Division representative shall counsel the parent regarding the meaning, finality and consequences of surrendering parental rights in accordance with N.J.A.C. 10:121A-5.4 when surrendering parental rights is being considered. For all cases in litigation, surrenders of parental rights must go through appropriate court proceedings.
- (b) The Division representative shall advise the parent that he or she may stop the surrender of parental rights at any point in the procedure.
- (c) The Division is not obligated to accept a surrender of parental rights from a parent.
- (d) The Division representative shall determine that the parent is competent to execute a surrender and has a full opportunity to understand the meaning and consequences of surrendering parental rights by:
 1. Questioning and observing the parent and reviewing evaluations, professional opinions or reports, as necessary, to determine that there are no obvious or overt indicators that the parent has a diminished capacity to understand the meaning, consequences and finality of surrendering parental rights because of alcohol or drug use, psychological disorder or mental deficiency;
 2. Reading aloud to the parent the full contents of surrender of parental rights documents;
 3. Providing a verbal explanation to the parent of the contents of the surrender of parental rights documents including an explanation of the meaning, consequences and finality of the act of surrendering parental rights;

4. Providing an opportunity for the parent to ask questions about surrendering parental rights; and

5. Asking the parent to explain, in his or her own words, the meaning, consequences and finality of surrendering parental rights.

(e) The Division representative shall make documents related to surrendering parental rights available in a language, which the parent understands, or the Division shall provide competent verbal or sign translation of the surrender of parental rights procedure into a language, which the parent understands.

(f) The Division representative shall attempt to determine, through questions and observation, any duress, undue pressure or coercion which has been brought to bear on the parent in order to induce him or her to surrender parental rights.

1. The Division representative shall not coerce the parent in order to induce him or her to surrender parental rights; and

2. The Division representative shall attempt to ascertain the cause of any duress, undue pressure or coercion on the parent and counsel the parent regarding services to help the parent cope with the duress.

(g) The surrender of parental rights shall be witnessed by at least one Division representative who is not assigned to the case, who is 18 years of age or older and who is not notarizing the signature.

(h) The witness shall make a determination, to the best of his or her ability, that:

1. The parent understands the meaning, consequences, and finality of surrendering parental rights;

2. The parent is competent to surrender parental rights; and

3. The Division representative attempted to determine and mitigate any duress on the parent in accordance with (f) above and that the parent is surrendering parental rights of his or her own free will.

(i) The witness shall sign an affidavit regarding his or her role and observations in the surrender of parental rights.

(j) Unless the person is disruptive to the procedure or is a source of duress on the parent, the parent may have a friend, relative or representative present at the surrender of parental rights procedure. The friend, relative or representative may sign an affidavit regarding his or her role and observations during the surrender of parental rights but shall not be the witness to the procedure identified in (g) above.

(k) The Division representative or the witness shall stop any procedure regarding the surrender of parental rights if the parent appears to be under duress or incompetent to surrender parental rights in accordance with (d) or (f) above.

10:133J-3.2 Additional procedures

(a) The Division representative shall give the parent a copy of all documents signed by the parent and those documents read to the parent during the surrender of parental rights procedure.

(b) The Division representative shall document the surrender of parental rights for the child's case record including the questions asked by the parent along with the answers provided by the Division representative or by any witness present.

(c) The Division representative shall obtain, to the extent possible and necessary, each birth certificate, marriage or civil union certificate, domestic partnership affidavit, divorce or dissolution of a civil union or domestic partnership decree, death certificate, affidavit and document related to the surrender of parental rights.

(d) The Division representative shall advise the parent of the Division's Adoption Registry and of any laws or procedures regarding the confidentiality of records related to surrender of parental rights or adoption.

10:133J-3.3 Surrender executed in other states and other countries

Pursuant to N.J.S.A. 9:3-41, the Division shall give full faith and credit to a surrender of parental rights executed in any other state or foreign country if the procedures for the surrender of parental rights complied with that state's or country's applicable statutes and regulations, and was taken more than 72 hours after the birth of the child.